

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments,
FM Broadcast Stations
(Lancaster and Pickerington, Ohio)

)
)
) MB Docket No. 03-238
) RM-10820
)
)

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To: The Secretary
Attention: Assistant Chief, Audio Division, Media Bureau

NOV 18 2004

STATEMENT FOR THE RECORD AND Federal Communications Commission
REPLY TO FURTHER COMMENTS Office of Secretary

Franklin Communications, Inc. ("Franklin"), licensee of Station WJZA, Channel 278A, Lancaster, Ohio, herein files its Statement for the Record and Reply to Further Comments filed March 1, 2004, by North American Broadcasting Co., Inc. ("North American") on the *Notice of Proposed Rule Making*, DA 03-3648, released November 17, 2003 ("NPRM") that proposes to (a) reallocate Channel 278A from Lancaster, Ohio, to Pickerington, Ohio and (b) modify the WJZA license to specify operation on Channel 278A at Pickerington, Ohio.¹ The Commission should consider this Statement and Reply on the merits in this proceeding as a matter of due process pursuant to its discretion under Section 1.415(d) of the Commission's Rules. In this Statement and Reply to Further Comments, Franklin addresses *new matters* that have arisen since January 30, 2004, the date on which reply comments were due in this docket, and since March 1, 2004, the date on which North American filed its Further Comments.

¹ In a separate pleading filed today, Franklin is seeking leave to file this Supplement.

North American's Further Comments rehash its prior arguments that the Commission should allot Channel 278A to Pickerington at inferior reference coordinates in order to grant its application for WEGE (File No. BPH-20040108ALM). North American's case for waiver of the Commission's rules for acceptance of its defective application has depended on its assertion that, even though its application short spaces the licensed site of WPAY-FM, Portsmouth, Ohio, the Commission should waive its rules and accept the application because, in the future, it would be fully-spaced to the Class C construction permit for WPAY-FM as well as to WPAY-FM as reclassified to Class C0. However, the situation is now altered, and North American's house of cards collapses.

On November 16, 2004, Radio Stations WPAY/WPFB, Inc. ("Radio Stations"), the licensee of WPAY-FM, filed an application (File No. BMPH-20041116ACO) to modify its permit for full Class C facilities for WPAY-FM to construct this facilities at its existing licensed transmitter site. The WEGE application is in conflict with both the WPAY-FM licensed site and BMPH-20041116ACO, so North American's arguments set forth in its Further Comments are no longer well-taken.

On November 16, 2004, Radio Stations also filed a "Supplement to Motion to Dismiss" directed against North American's application No. BPH-20040108ALM, referenced above.² Now that WPAY-FM has filed an application to construct Class C facilities at its existing site which is in conflict with North American's illegal application, North American's application must be dismissed. Since the application must be dismissed, it need not be considered as a counterproposal that would restrict the area within which WJZA could locate its facilities as a Pickerington station.

² Copy attached and incorporated herein by reference.

The Commission should (1) promptly dismiss or return as unacceptable North American's minor change application for WEGE (BPH-20040109ALM); (2) grant Franklin's proposal at its preferred reference coordinates³; and (3) deny North American's Petition for Reconsideration.

In light of the foregoing, there is no reason whatsoever for the Commission to consider the imposition of a site restriction on the Pickerington, Ohio, allotment for WJZA. North American's application cannot be granted due to WPAY-FM's recent modification application.

Conclusion

North American's WEGE application is not entitled to comparative evaluation because it is defective as it short-spaces the licensed facilities and construction permit application (File No. BMPH-20041116ACO) of WPAY-FM, and the WEGE application must be returned as an unacceptable counterproposal.

FRANKLIN COMMUNICATIONS, INC.

By: 

Gary S. Smithwick
Its Counsel

Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, NW
Suite 301
Washington, DC
(202) 363-4560

November 18, 2004

³ It is well established that counterproposals must be technically correct and substantially complete when filed and that counterproposals will be considered only if they are filed by the deadline date for comments. See Section 1.420 (d) of the Commission's Rules, *Broken Arrow and Bixby, Oklahoma*, 3 FCC Rcd 6507 (1988) and *Springdale Arkansas et al.*, 4 FCC Rcd 674 (1989), *recon.*, 5 FCC Rcd 1241 (1990).

CERTIFICATE OF SERVICE

I, Tamara J. Fontana, hereby certify that copies of the foregoing Reply Comments were this 18th day of November, 2004, sent via First Class Mail, postage pre-paid (or by hand delivery, if so indicated), to the following:

Victoria M. McCauley, Esq.*
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Marissa G. Repp, Esq.
Hogan & Hartson LLP
555 13th Street, NW
Washington, DC 20004-1109

Dennis Begley, Esquire
Reddy, Begley & McCormick, LLP
1156 15th Street, N.W., Suite 610
Washington, D.C. 20005-1770

*Hand-delivered


Tamara J. Fontana

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

In re Application of)
)
NORTH AMERICAN BROADCASTING CO., INC.) File No. BPH-20040108ALM
Westerville, Ohio (WEGE))
Facility ID No. 60099)
)
For a Minor Change in Licensed Facilities)

To: Chief, Media Bureau

SUPPLEMENT TO MOTION TO DISMISS

Radio Stations WPAY/WPFB, Inc. ("Radio Stations"), licensee of Station WPAY-FM, Portsmouth, Ohio, hereby supplements its motion to dismiss the above-styled application of North American Broadcasting Co., Inc. ("North American") seeking minor changes to the licensed facilities of Station WEGE(FM), Westerville, Ohio. In support thereof, the following is stated:

Background

1. Station WPAY-FM is licensed as a Class C station but operates with less than the present minimal Class C facilities. It holds a construction permit (File No. BPH-20021023ABC) for a new facility which will operate with Class C facilities. In its instant application North American seeks a construction permit for new facilities that are short-spaced to the WPAY-FM licensed facilities. North American seeks a waiver of Sections 73.207 and 73.3517 on the basis that its application is not short-spaced to the WPAY-FM construction permit.

2. Pursuant to the provisions of Section 73.3573, Note 4, of the Commission's Rules North American previously filed an application (File No. BPH-20011221AAQ) to modify WEGE

that was also short-spaced to the licensed facilities of WPAY-FM as a Class C facility under Section 73.207 but would be fully spaced if WPAY-FM was downgraded to Class CO (the “Triggering Application”). The Triggering Application sought to reclassify Station WPAY-FM as a Class CO station. In accordance with the rule the Commission issued an Order to Show Cause regarding WPAY-FM’s Class C status. By letter dated April 26, 2002, WPAY-FM responded that it intended to seek authority to modify WPAY-FM to obtain Class C status. In accordance with the rule, Radio Stations filed a timely application (File No. BPH-20021023ABC) which application was granted by the Commission on September 26, 2003 (the “WPAY-FM Construction Permit”).

3. The Commission’s rules are clear that upon grant of the application seeking full Class C facilities the triggering application must be dismissed. Note 4 to Section 73.3573 provides in part “Upon grant of such a construction permit application, the triggering application will be dismissed.” In spite of this provision, North American argued that its Triggering Application should be permitted to remain pending since it was not in conflict with the WPAY-FM construction permit. The Commission disagreed with WEGE’s position and properly dismissed its Application as “unacceptable for filing” on January 2, 2004. (See Exhibit No. 1).¹

4. North American’s instant application was filed within days of the dismissal of the Triggering Application. Its latest proposal moves its transmitter site into central Columbus, Ohio and further exacerbates the short spacing to WPAY-FM’s licensed Class C facility. North American seeks a waiver of Section 73.207(b) and 73.3517 since its application is properly spaced to the WPAY-FM construction permit and will be properly spaced to the WPAY-FM licensed facility if

¹ North American has filed a Petition for Reconsideration of the dismissal of this application, which petition Radio Stations has opposed.

it is downgraded to Class CO. North American concedes its application is in conflict with WPAY-FM's license for a Class C facility.

5. As Radio Stations has previously argued, it is still entitled to protection of its licensed facilities under the provisions of Section 73.207. In adopting the rules, the Commission clearly recognized that the triggering applicant was entitled to no protection during the construction by the Class C station. In its Second Report and Order in MM Docket No. 98-93, 15 FCC Rcd 21649 (2002), the Commission stated:

We recognize that, under the Commission's first-come first-served filing procedures, triggering applicants may lose priority rights to spectrum made available by automatic reclassification as a result of dismissal of their applications. Nevertheless, we believe that this procedure is necessary in order to prevent a backlog of triggering proposals that must be protected yet cannot be granted until a Class C station fails to carry out authorized facility upgrades.

Id. at Note 56.

Clearly, in this case, the North American application cannot be granted since the WPAY-FM licensed facility is entitled to protection as a full Class C facility until WPAY-FM's new Class C facility is completed or it fails to construct such facilities.

**North American's Application is Now Impeding
The Modification of the WPAY-FM Construction Permit**

6. Concurrent with the filing of this Supplement, Radio Stations has filed an application to modify the WPAY-FM Construction Permit (File No.: BMPH-20041116ACO). The modification proposes construction of Class C facilities for WPAY-FM at its existing licensed transmitter site. The modification will allow the expeditious construction of the new facility and significantly reduce construction costs by permitting construction at an existing transmitter site that is owned by the

licensee. The FAA has issued a Determination of No Hazard for the proposed tower. The tower has been registered and its registration number is 1246113.

7. Radio Stations had originally proposed to construct its new facilities at its licensed site. The FAA, however, determined the tower was a hazard to air navigation. Rather than delay processing of its FCC application for full Class C facilities while it appealed the FAA determination, Radio Stations located another site and amended its application to the new site. It also diligently pursued the FAA matter in the hopes of being able to construct at its licensed site. It has now achieved the FAA determination of no hazard and seeks a modification of its construction permit to construct at its licensed site.


8. As Radio Stations has previously argued, the North American application should not be accepted since it prevents WPAY-FM from modifying the WPAY-FM Construction Permit in such a manner that would conflict with WEGE's application. Radio Stations is permitted under the rules to modify its construction permit if it determines another site is more suitable for the operation of WPAY-FM. This is exactly what has occurred. The WEGE application conflicts with the WPAY-FM modification application for Class C facilities at its licensed site.

9. Radio Stations recognizes it has three years to complete its Class C facilities and plans to diligently pursue its construction. Its efforts, however, should not be impeded by an application that is not permitted by the Commission's rules.²

² Pursuant to Section 73.3598 of the Rules, Radio Stations is also submitting a request to toll the period of construction of the WPAY-FM Construction Permit pending Commission action on the blocking WEGE application.

In light of the above, it is clear the Commission's rules require dismissal of the WEGE application. Accordingly, Radio Stations WPAY/WPFB, Inc. hereby reiterates its requests for the expeditious dismissal of the application.

RADIO STATIONS WPAY/WPFB, INC.

By: 
DENNIS F. BEGLEY
Its Counsel

Reddy, Begley & McCormick, LLP
1156 15th Street, N.W., Suite 610
Washington, D.C. 20005-1770
(202) 659-5700

November 16, 2004

Exhibit No. 1

January 2, 2004 Letter

Dismissing North American Triggering Application

FEDERAL COMMUNICATIONS COMMISSION
445 12th STREET SW
WASHINGTON DC 20554

MEDIA BUREAU
OFFICE OF BROADCAST LICENSE POLICY
AUDIO DIVISION
APPLICATION STATUS: (202) 418-2730
HOME PAGE: WWW.FCC.GOV/MB/AUDIO/

JAN - 2 2004

PROCESSING ENGINEER: James Bradshaw
TELEPHONE: (202) 418-2700
FACSIMILE: (202) 418-1410
MAIL STOP: 1800B3
INTERNET ADDRESS: James.Bradshaw@fcc.gov

North American Broadcasting Co., Inc.
1458 Dublin Road
Columbus, OH 43215

In re: WEGE(FM), Westerville, OH
Facility ID # 60099
North American Broadcasting Co., Inc.
BPH-20011221AAQ

Dear Applicant:

This letter refers to the above-captioned minor change application and the October 24, 2003 Motion to Dismiss filed by WPAY-FM.

This application contained a request for Class C0 reclassification of station WPAY-FM, Portsmouth, OH. Absent the proposed reclassification of WPAY-FM, this application is unacceptable for filing. Radio Stations WPAY/WPFB, Inc., licensee of WPAY-FM, filed application BPH-20021023ABC to increase that station's technical facilities in response to the subject application, as permitted by Note 4 to C.F.R Section §73.3573. The WPAY-FM application was granted September 26, 2003. Therefore, the application will be dismissed.

As a result of the grant of WPAY-FM's application and pursuant to the provisions of Note 4 to 47 C.F.R Section § 73.3573, application BPH-20011221AAQ IS DISMISSED. In addition, the October 24, 2003 Motion to Dismiss IS HEREBY DISMISSED AS MOOT.

Sincerely,



James D. Bradshaw
Associate Chief
Audio Division
Media Bureau

cc: Marissa Repp
Dennis F. Begley

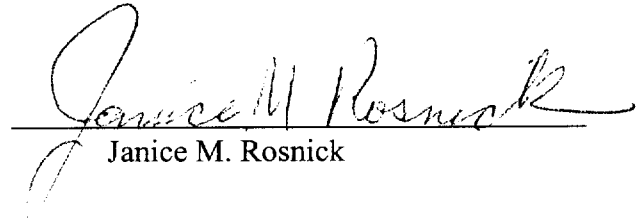
CERTIFICATE OF SERVICE

I, Janice M. Rosnick, hereby certify that on this 16th day of November, 2004, copies of the foregoing **SUPPLEMENT TO MOTION TO DISMISS** were hand-delivered or mailed, first-class, postage prepaid, to the following:

Peter H. Doyle, Esq.*
Chief, Audio Division, Media Bureau
Federal Communications Commission
The Portals, Room 2-A267
445 Twelfth Street, S.W.
Washington, DC 20554

James Bradshaw*
Audio Division
Federal Communications Commission
The Portals, Room 2-B450
445 Twelfth Street, S.W.
Washington, D.C. 20554

Marissa G. Repp, Esq.
Hogan & Hartson, L.L.P.
555 13th Street, NW
Washington, DC 20004-1109


Janice M. Rosnick

* Hand Delivery